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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 832

MEHMET SABAHITTIN GIZ,
Petitioner

v.

HERBERT BROWNELL, JR.,
Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming by a divided vote the judgment of the District Court for the District of Columbia declaring petitioner ineligible for citizenship.

Opinions Below

The opinion of the District Court is unreported and is set forth at page 28 of the record. The opinion of the Court of Appeals is not yet reported and is set forth at page 42 of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on December 13, 1956. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether petitioner, a citizen of Turkey is permanently barred from American citizenship under the Selective Training and Service Act of 1940 and therefore ineligible for preexamination or suspension of deportation by reason of his claim for draft exemption filed on December 31, 1942 where it appears:

   (a) That he was recognized as a temporary visitor and a student at the time by the Immigration and Naturalization Service;

   (b) That he applied to the Selective Service System for a certificate of nonresidence in 1944 and such application was denied on the merits;

   (c) That his draft board acknowledged in writing that such draft exemption claim was filed by mistake and at the suggestion of the chief clerk of the board;

   (d) That petitioner subsequently sought to enter the armed forces of the United States but was rejected because of alienage.

2. Whether petitioner was a nonresident on December 31, 1942 and as such not subject to the Selective Training and Service Act of 1940 (50 App. U.S.C. 303a).

3. Whether petitioner's status as a resident was taken as confessed where it appears that he filed an application for a certificate of nonresidence and the same was denied on its merits by the Selective Service System.

4. Whether petitioner claimed draft exemption under mistake where it is undisputed that he made such claim at the suggestion of his draft board which now acknowledges that an error was made.

5. Whether petitioner's subsequent efforts to enter the armed forces of the United States which were unsuccessful because of his alienage, removed the citizenship bar.

Statutes and Regulations

The pertinent statutes and regulations are set forth in Appendix A to this petition.

Statement of Facts

Petitioner is a native and citizen of Turkey, is married to an American citizen, and is the father of an American born child. He came to the United States lawfully as a student on September 9, 1939, and as Exhibit 12 in his Immigration File reveals, a fact admitted by the pleadings, he remained in a lawful student status until July 21, 1945 (R. 4, 7, 9).

Petitioner has been directed to leave the United States and has been denied permission to remain here through relief known as preexamination or suspension of deportation upon the ground that he is ineligible for American citizenship because he claimed draft exemption as a neutral alien (R. 39).

Petitioner claimed draft exemption as a neutral alien on December 31, 1942 (R. 10). Exhibit 4 in the Immigration File is a letter from the Chairman of the local draft board addressed to the State Director, pointing out that the petitioner claimed draft exemption by mistake at the request of the then Chief Clerk of the Draft Board. The Chairman of the Draft Board states in this letter (R. 41):

> "In reviewing this file at the registrant's request, we note that DSS Form 301 (request for exemption as a neutral) was filed by Mr. Giz on December 31, 1942 at the request of the then chief clerk, Mrs. Dora Roberts. It is our best judgment that he should not have been permitted to do this inasmuch as he was not vulnerable at that time for a 1-A classification or induction by

this board. He is desirous of enlisting and serving in the armed forces of the United States but cannot do so because of his citizenship. . . .

"This board therefore recommends that the registrant be permitted to withdraw the DSS Form 301 from his file."[1]

In his deportation proceeding instituted in 1947 (R. 5), the petitioner testified without contradiction as follows (R. 35, 37):

Q. When you signed this Form DSS 301, did you sign it for the purpose of avoiding military service or for some other reason?

A. Not for avoiding military service. The purpose in my mind was at that time my studies were so heavy I could not take time to go from San Francisco to Berkeley to arrange procedure and, so I thought signing this form would not keep me absent from my studies.

* * * * *

A. I did not ask for the application. The application was presented to me.

* * * * *

Q. Did you undersand at that time that the execution of that form debarred you forever from becoming a citizen of the United States?

A. No.

The Immigration File also reveals that thereafter Turkey became a belligerent on February 25, 1945, that petitioner sought to submit to induction, that he was directed on

[1] On March 17, 1947, the Local Board was advised in conformity with the practice of the Selective Service System that Form 301 could not be withdrawn. Exhibit 7 in petitioner's Immigration File.

July 26, 1946, to report for a pre-induction physical (Exhibit 8 in the Immigration File), that he was declared physically fit (Exhibit 9 in the Immigration File), but that his efforts to enlist in the United States Army were unsuccessful, and, in fact, he was rejected from the Army because of alienage. (Par. 15 of Complaint Admitted By Answer).

The file further reveals that the petitioner applied, pursuant to Selective Service regulations, in 1944 for a certificate that he was a nonresident on June 1[illegible], 1944 (Exhibit 13 in the Immigration File). The draft board advised him that they would make a determination as to his status of resident or non-resident upon receipt of a letter from his consul. On August 11, 1944 (Exhibit 11 in the Immigration File), a determination was made that he was a person residing in the United States.

On February 10, 1953, the Board of Immigration Appeals rejected the contention that the petitioner was a nonresident upon the ground that he was required to file his application with Selective Service prior to May 16, 1942. In addition, the Government in its fourth defense in its answer herein, asserts that the application for a certificate of non-residence was not timely filed in the instant case, and therefore, that the petitioner was, in fact, subject to the Selective Training and Service Act of 1940 (R. 38).

Petitioner contended below that he did not incur the bar of ineligibility for American citizenship for the following reasons:

1. That he was not a person residing in the United States and as such was not subject to the Selective Training and Service Act of 1940.

2. That he was induced to file his claim for draft exemption by mistake.

3. That he subsequently submitted himself for induction and accordingly made a proper withdrawal of his claim to draft exemption.

The District Court rejected the petitioner's contentions, holding that under *Machado* v. *McGrath*, 89 U.S. App. D.C. 70, 193 F. 2d 706 (1951), petitioner's status as a resident was taken as confessed for failure to apply for a certificate of non-residence prior to May 16, 1942, and further that the record conclusively shows that the petitioner claimed draft exemption "freely with full knowledge as to the consequences" (R. 29).

The Court of Appeals affirmed by a divided vote. Judge Bazelon dissenting, observed (R. 46 footnote 3):

> "From all that appears in this record, in passing on the merits of the application the Director of Selective Service based his determination that appellant was 'residing in the United States' solely upon the appellant's lawful status as a temporary student visitor. On that basis, I think the Supreme Court's decision in *McGrath v. Kristensen*, 340 U.S. 162 (1950), especially the concurring opinion of Mr. Justice Jackson, requires us to hold that determination erroneous as a matter of law. Such an error, in my view, does not bind the Immigration Service. *Ex parte Ghosh*, 58 F. Supp. 851 (S.D. Cal. 1944)."

Reasons for Granting the Writ

1. The decision below is in conflict with *Moser* v. *United States*, 341 U.S. 41 (1951). There this Court found that the petitioner was understandably lulled into a misconception of the legal consequences of applying for draft exemption by the Government. It stated at page 47:

> "Petitioner did not knowingly and intentionally waive his rights of citizenship. In fact because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the

> case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness."

The *Moser* case sets forth a broad principle of law and fair play applicable to dealings with our Government. Where an individual has been misled by Government officials, "the government should always be a gentleman" and not take advantage of its error. The doctrine has been frequently applied in tax and citizenship cases. *Strockstrom* v. *Commissioner,* 190 F. 2d 283 (C.A.D.C. 1951); *Staten Island Hygenia Ice and Cold Storage Co.* v. *United States,* 85 F. 2d 68 (C.A. 2, 1936); *Uyeno* v. *Acheson,* 96 F. Supp. 510 (W. D. Wash., 1951); *Di Girolamo* v. *Acheson,* 101 F. Supp. 380-382 (Dist. of Col., 1951). *Moser* v. *United States,* 341 U.S. 41 (1951); *Hong* v. *Acheson,* 110 F. Supp. 60, (N.D. Calif. 1953); *Gay* v. *Brownell,* 120 F. Supp. 319 (*D. C. Puerto Rico,* 1954); *Rueff* v. *Brownell,* 116 F. Supp. 298 (D.C. N.J. 1953).

The Court below, however, declined to apply this rule of fair play in the instant case.

The testimony and documentary evidence herein make it clear that petitioner claimed draft exemption:

> (a) At the suggestion of and through the error of the chief clerk of his draft board to whom he properly looked for advice.
>
> (b) At a time when his induction into the armed forces was not imminent.
>
> (c) Without any request on his part for Form DSS 301.
>
> (d) Without realization that he would be permanently barred from citizenship.

In view of the error of the draft board clerk, it is neither fair nor just to bar petitioner from American citizenship,

and in accordance with the cases noted above, it should be ruled that he is eligible for American citizenship.

2. The decision below is in conflict with *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), as Judge Bazelon found, with *Benzian* v. *Godwin*, 168 F. 2d 952 (C.A. 2, 1948), and raises an important question of administrative law. In the *Kristensen* case, this Court ruled that an alien could only be barred from citizenship under the 1940 Selective Service Act where he was residing in the United States at the time of his draft exemption claim.

Petitioner came to the United States lawfully as a student on September 9, 1939, and as Exhibit 12 in his Immigration File reveals and as respondent admits in paragraph 4 of his third defense (R. 7), petitioner remained in a lawful student status until July 21, 1945. He claimed draft exemption as a neutral alien on December 31, 1942, when he was still in such status.

On June 13, 1944, petitioner applied to his draft board for a certificate of nonresidence, and this application was denied on its merits on August 11, 1944. (Exhibits 11 and 13 in petitioner's immigration file.) Although the Selective Service System considered that petitioner had filed his application in a timely manner, both the Board of Immigration Appeals and the Court below, applying the *dicta* of *Machado* v. *McGrath*, 89 U.S. App. D.C. 70, 193 F. 2d 706 (1951), *cert. denied* 342 U.S. 948, held that by reason of his failure to claim non-residence within 90 days or before May 16, 1942, his status as a resident was taken as confessed.

(a) The comments of the Selective Service System in *Problems of Selective Service* (1952), Text page 107, are to the contrary. They state:

> "In all cases where an application was not filed within the 90 days, the director of Selective Service determined whether or not the alien was residing in the United States."

The regulations, 32 C.F.R. 611.29(b) in force after September 14, 1942 (*Problems of Selective Service*, 1952, Appendices A-C p. 40) state:

> "Notwithstanding any other provisions of these regulations, whenever the Director of Selective Service is satisfied that a non-declarant alien is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Service and Training Act of 1940, as amended, he may issue or authorize the issuance of an Alien's Certificate of Nonresidence, (Form 303) to such non-declarant alien."

Thus it appears that there was no time limitation upon the consideration of an application for certificate of nonresidence by the Director of the Selective Service System.

(b) Finally, and most important, is the fact that the Selective Service System did not believe that there was any jurisdictional defect or any untimely filing of the application for the certificate of nonresidence. This issue was erroneously raised for the first time by the Board of Immigration Appeals in its decision of February 10, 1953 (R. 32).

Benzian v. *Godwin*, 168 F. 2d 952 (C.A. 2, 1948), *cert. denied* 335 U.S. 886 is particularly in point. Benzian claimed draft exemption as a neutral alien in 1943. In 1946 he applied for a certificate of nonresidence and this application was denied in 1947. The Court of Appeals noted at page 956:

> The determination cannot have been made on the basis of his failure to file Form 302 [application for certificate of nonresidence] within the prescribed time limit, for when the determination was made, the three month requirement had been removed. We think it not material that the determination was made after appellant had filed Form 301, for appellant's status as a resident or nonresident was unaffected by the filing of that form.

Can one administrative agency (the Board of Immigration Appeals) overrule the Selective Service System on an issue particularly within the latter's competence, i. e., the issue of timely filing of a Selective Service non-residence application? This case presents a conflict with *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Benzian* v. *Godwin*, *supra*, and the important administrative law issue as to the controlling weight to be given agency determinations where they are in disagreement.

3. We have noted the error of the draft board clerk in entrapping petitioner into claiming draft exemption as a neutral. Petitioner has been caught in a maelstrom of bureaucratic errors. The Attorney General erroneously ruled that all persons physically present in the United States were residing here for the purposes of the Selective Service Act of 1940, 39 *Op. Atty. Gen.* 504, *McGrath* v. *Kristensen*, 340 U.S. 162 (1950). Based on this erroneous ruling, Selective Service regarded petitioner, a temporary visitor under our immigration laws and so recognized on December 31, 1942, by the Immigration Service and the State Department, as a resident. The Selective Service determination of petitioner's residence was not made upon the basis of any standards, but in the absolute, unbridled discretion of that agency. Thus in *Problems of Selective Service*, 1952, Text, pp. 106, 107, 125, 128-129, the Selective Service System states:

> "In a way, however, the determination of residence by the Director was somewhat "fictional" since on October 11, 1940, the Attorney General had rendered an opinion (39 Op. Atty. Gen. 504) * * * It is true that this Attorney General later in the role of an Associate Justice of the United States Supreme Court designated the opinion as incorrect (*McGrath* v. *Kristensen*, 340 U.S. 162, 71 S. Ct. 224). In the meantime, however, it had created difficulties for Selective Service.
>
> * * * * *

> Resort to the courts was sometimes necessary for a determination of residence, *due to the lack of statutory or administrative standards relating to its definition.* (Italics supplied).
>
> Ultimate authority for the determination of residence needs to repose in the Director, however, even though this might entail the exercise of rather arbitrary actions in some cases. Section 611.29 of the 1940-47 regulations conferred such authority on the Director."

In *Ex Parte Ghosh,* 58 F. Supp. 851 (S. D. Calif. 1944), appeal dismissed, 148 F. 2d 822, the Court said:

> "I do not think the rules and regulations provide any norm or standard by which the local board can determine whether or not a person is in one of the other categories mentioned in Section 5 of the Act, 50 U.S.C.A. Appendix § 305; nor do they provide a norm or standard by which if certain facts are present it can determine whether or not a person is or is not residing in the United States as the term is used in Sections 2 and 3 of the Act, 50 U.S.C. Appendix §§ 302, 303. • • •
>
> I think he (the Director of Selective Service) has simply, under the regulations as they now stand, reserved to himself the power personally to determine—by what rules, no one would know—this petitioner or any other person who sought a certificate of exemption [as a non-resident]—whether he was or was not entitled to it.
>
> That, in my judgment, is what is described in the decisions as arbitrary and capricious, and I would say lack of due process and a lack of rule of reason."

Petitioner filed an application for a determination of residence with the Selective Service System in 1944 which was denied upon its merits. As Judge Bazelon observed, and as the Selective Service Regulations specifically authorized

[32 C.F.R. 611.29(b); *Benzian* v. *Godwin*, 168 F. 2d 952 (C.A. 2, 1948)], the late filing of such application was waived (R. 45, footnote 3). Nevertheless, the Board of Immigration Appeals erroneously ruled that petitioner was a resident, subject to the draft, and therefore ineligible for citizenship, not on the basis of the merits, but because his residence must be deemed confessed by reason of the late filing of his residence application before the Selective Service System (R. 34).

Reliance upon the regulations to accomplish a *conclusive presumption of residence*, as the Court below and the Board have done, violates the due process clause of the Fifth Amendment to the Constitution.

In *Manley* v. *Georgia*, 279 U.S. 1 (1928) the Supreme Court held:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. *Bailey* v. *Alabama*, 219 U.S. 219, 223 * * *. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property."

See also: *Mobile, Jackson & Kansas City Railroad Co.* v. *Turnipseed*, 219 U.S. 35 (1910); *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 239, 240 (1925); *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1931); *Adler* v. *Board of Education*, 342 U.S. 485, 496 (1952).

4. On February 25, 1945, Turkey became a co-belligerent. Thereafter petitioner sought to enter our armed forces. On July 26, 1946, he was directed to report for a pre-induction physical examination (Exhibits 5 and 8 in Immigration File), and was declared physically fit (Exhibit 9 in Immigration File). However, his efforts to enlist were unsuccessful and he was rejected because of alienage. (Par. 15 of Complaint admitted by Answer, R. 5, 8).

Petitioner's withdrawal of his claim of draft exemption

was recommended by his draft board (R. 41). Nevertheless, although locus poenitentiae has been recognized in these circumstances by many cases, *In re Siem,* 284 Fed. 868 (affirmed, 299 Fed. 582, C.A. 9, 1924); *In re Bevelacqua* 295 Fed. 862 (D.C. Mass. 1924); *Petition of Ajlouny,* 77 F. Supp. 327 (E.D. Mich. 1948), the Courts below refused to accord such right to petitioner.

By submitting himself to induction petitioner no longer secured the exemption of the Selective Service Act. Therefore, the disabilities incurred by his original filing of a draft exemption claim were removed. He is therefore eligible to citizenship.

Indeed, such was the conclusion of the Selective Service System on November 22, 1946, when they advised the Immigration Service in a letter contained in the Immigration file of *Matter of Josefsson,* File No. 4558054:

> "Where the benefits derived by a neutral alien by the proper filing of D.S.S. Form 301 no longer exist (exemption from training and service), it is our inclination that the penalties incurred by such action (debarment from obtaining United States citizenship) should likewise be removed. This opinion contemplates the situation where a neutral alien, who has filed a D.S.S. Form 301, is later declared a cobelligerent alien, and thus subjected to training and service under the Selectibe Training and Service Act."

Conclusion

In view of the conflict in decisions on these important issues, it is submitted that certiorari should be entertained.

For the reasons set forth above, it is requested that a writ of certiorari issue.

Respectfully submitted,

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